

BEFORE THE COPYRIGHT ROYALTY TRIBUNAL
WASHINGTON, D.C.

In the Matter of)	
)	
1982 and 1983 Juke-Box)	Docket No. 83-2
Royalty Distribution)	Docket No. 84-2
Proceedings)	Docket No. 83-JD

ACEMLA'S REPLY TO THE PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF ASCAP, BMI AND SESAC

Bruce A. Eisen
Allan G. Moskowitz
Shrinsky, Weitzman & Eisen, P.C.
1120 Connecticut Avenue, N.W.
Suite 270
Washington, D.C. 20036
(202) 872-0010

October 24, 1985

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
THE ABS FINDINGS	2
ACEMLA'S STATUS	4
ABS' ENTITLEMENT	7
ACEMLA'S ENTITLEMENT	9
CONCLUSION	16

BEFORE THE COPYRIGHT ROYALTY TRIBUNAL

WASHINGTON, D.C.

In the Matter of)	
)	
1982 and 1983 Juke-Box)	Docket No. 83-2
Royalty Distribution)	Docket No. 84-2
Proceedings)	Docket No. 83-JD

ACEMLA'S REPLY TO THE PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF ASCAP, BMI AND SESAC

Asociacion de Compositores y Editores de Musica Latino-
americana ("ACEMLA"), by its attorneys, hereby submits its Reply
to the Proposed Findings of Fact and Conclusions of Law of ASCAP,
BMI and SESAC (collectively referred to as "ABS"). In support
thereof, the following is shown:

PRELIMINARY STATEMENT

There are two basic issues in this proceeding, i.e. the
determination of whether or not ACEMLA is a performing rights
society pursuant to 17 U.S.C. Section 116(e)(3), and, if so,
whether ACEMLA or ABS has proven entitlement to the 5% of the
1982 and 1983 Jukebox Royalty Funds representing Spanish langu-
age musical works performed on jukeboxes.

The ABS Proposed Findings of Fact and Conclusions of Law
are wholly predictable and unconvincing. They draw their sup-
port from deficient surveys and distortions of record evidence.
Ultimately, they fail to properly consider matters of decisional

significance and result in the unwarranted conclusion that size alone should dictate the Tribunal's resolution of the issues. ACEMLA submits that it is the only party to this proceeding which has attempted to reasonably meet the documentation called for in the Order Consolidating Proceedings, 50 Fed. Reg. 31645, published August 5, 1985. Hence, ACEMLA, and not ABS, has demonstrated its entitlement to that part of the Jukebox Royalty Funds which are in dispute.

THE ABS FINDINGS

1. Perhaps the major deficiency in the ABS direct case, as incorporated into its findings of fact, is its reliance on conclusory testimony of its witnesses, each of whom is in the employ of either ASCAP or BMI. Under such circumstances, it is difficult to comprehend how ABS' evidence can be construed as anything approaching objectivity. It appears that the major foundation for its position derives from its perceived "strength" and the oft-recited statement that no significantly performed copyrighted works belong to any copyright owners who do not enjoy an affiliation with ABS.

2. There is virtually no weight that should be ascribed to the testimony of such witnesses as Gloria Messinger and Alan H. Smith. Their claims that it would be "illogical" for copyright owners not to join one of the ABS societies and that only ABS has the necessary resources to properly represent copyright owners should be seen for what they truly are: self-serving

affirmations unsupported by any credible record evidence and contradicted by the facts which ACEMLA has adduced.

3. The findings of fact presented by ABS at paragraphs 22-27 are illustrative of this failure to grapple with hard evidence. Congress never intended that "bigness" be a prerequisite for a performing rights society when it adopted the statutory definition of Section 116(e)(3). Yet ABS continually emphasizes its dominant position in licensing performing rights. In attempting to hammer home this thesis, ABS simply misses the point. ACMEMLA has never contested the recognized dominance of ABS in the licensing function. Their influence and control is plain. Rather, it is the direct involvement in administering a single aspect of performing works on jukeboxes that is here in question, and ABS has not shown that it is entitled to that part of the fund which relates to Spanish language music.

4. ABS relies upon charts published by Replay, which is a trade magazine directed at the jukebox industry. It concludes that all songs appearing on 1982-1983 Replay charts were licensed by ABS (Findings of Fact, par. 29). The futility of this evidence is clear. The analysis of the Replay charts which appeared at ABS Exhibits 3 and 4 do nothing more than establish that ABS licensed all songs included on the Replay "Pop", "Country" and "R&B" charts that were reviewed. Similarly, ABS Exhibits 1 and 2 which purported to be an analysis of Billboard charts for 1982 and 1983 supported the further conclusion that

ABS licensed almost all the songs appearing on "Hot 100", "Country", "Black" and "Adult Contemporary" charts (Findings of Fact, par. 28). These facts are at best interesting, for they have not the slightest relevance to a proceeding directed at matters concerning Spanish language music.

5. The only chart data entitled to evidentiary weight was submitted by ACEMLA. The record contains abundant information to show that charts relevant to Spanish language music in 1982-1983 included numerous titles in ACEMLA's catalogue (ACEMLA Exhibits 5 and 6). The Tribunal specifically recognized the value of relevant hit song charts in its Order Consolidating Proceedings, p. 3. ACEMLA presented such evidence. ABS did not. Undoubtedly aware of its failure to provide meaningful evidence gained from charts, ABS for the first time downplays the significance of this information. See ABS Findings of Fact, p. 13, f.n. 11. Thus, it attempts to neutralize a factor which the Tribunal found to be of potential decisional significance.

ACEMLA'S STATUS

6. ABS in its Findings of Fact and Conclusions of Law argues that ACEMLA is not a "performing rights society" as defined by Section 116(e)(3). However, its basis for this opinion is woven out of strained transcript citations; a concept of "performing rights society" that is not based on the record facts but rather on the tautology that what is not ABS cannot be a performing rights society; and ABS' absolutely discredited suspicion that ACEMLA holds no signed contracts with members.

7. First, contrary to ABS' assertion in Footnote 15 of its Findings, ACEMLA, as an assumed name of a corporation, Latin American Music Co., Inc. filed a Certificate of Assumed Name for Corporation and, therefore, is in compliance with New York State law. Article 4, Section 18 of the New York General Association's Law is only relevant to incorporated entities. See ACEMLA Direct Case, Exhibit 1.

8. While ABS cites Tr. 271-276 to show that ACEMLA has no "members", Mr. Bernard clearly testified at Tr. 271 and 276 that ACEMLA does have "members". (Tr. 271-275 consists mainly of a discussion of the translation of ACEMLA documents.)

9. After the document exchange between the parties on October 17, 1985, it is crystal clear that ACEMLA has (1) members; (2) signed contracts with its members; and (3) the authority to administer and represent the performing rights of those members. Further, it is also clear that those members have extensive musical catalogues whose rights have been assigned to ACEMLA. Mr. Bernard clearly testified that such written agreements existed (Tr. 226-227).

10. ABS' main disparagement of ACEMLA's status as a performing rights society is that ACEMLA is not ABS. Because of its historical monopoly on performing rights and its apparently resultant arrogance, ABS can only define a performing rights society as ABS. This illogic can be stated thusly: "ABS are the only performing rights societies. Therefore, if you are not

ABS, you simply are not."^{1/} According to ABS' version of the world, there is no necessity for the existence of other societies and therefore they do not exist. Congress never contemplated such a tortured and downright anticompetitive construction of the Act.

11. However, contrary to the circular reasoning of ABS and its witnesses, other individuals and entities believe that there is a need for at least one more performing rights society and ACEMLA believes enough in the reality of its existence to sign contracts assigning their performing rights to it!

12. Most of ABS' carps flow from its self-defining model of what a performing rights society is or should be. The number of ACEMLA's permanent employees is irrelevant to its status. Its lack of a listing in the telephone directory did not prevent Sadron of Ecuador and Edimusica of Colombia from contacting ACEMLA's offices. For foreign societies, the mail is a more efficient vehicle for transacting business. ABS' characterization of ACEMLA's "monitoring" as "haphazard, at best", is not supported by the record evidence and is merely an opinion. Mr. Bernard testified that his members are informed of ACEMLA's distribution system (Tr. 243-244). Moreover, as Mr. Bernard noted and as ACEMLA Exhibit 4 displays, many Spanish language records do not reflect the identity of the licensing performing rights society (Tr. 321).

^{1/} ABS could paraphrase Louis XIV with the conclusion "Le performing rights societies, c'est moi."

13. The only factual criticism that ABS has raised is that ACEMLA has not yet licensed any entities. While this is true, it is also irrelevant because ACEMLA has the authority and the capability to license. The Act does not require a performing rights society to be successful; it only requires that it be a performing rights society. Furthermore, the record is replete with examples of ACEMLA's attempts to license entities, attempts which are ongoing and which are nearing successful completion.

14. ABS' argument that ACEMLA cannot be a performing rights society because the only performing rights societies that exist are ABS is contradicted by the documentary evidence of signed contracts and ABS' own substantiation of titles in ACEMLA's repertoire. In short, ABS' witnesses, who do not know of, have never encountered, or cannot conceive of performing rights societies other than ABS, merely reflect ABS' own self-satisfied, limited opinion. ACEMLA is a performing rights society and the record supports that conclusion.

ABS' ENTITLEMENT

15. ABS' claim to the remaining 5% of the 1982 Jukebox Royalty Fund and 100% of the 1983 fund is based on their supposed pre-emption of the performing rights society field. However, there are two major flaws to this argument. First, ABS does not preempt the field; ACEMLA exists as a performing rights society which administers the rights to many Spanish-

language musical works. Second, and more to the point, ABS has not proven it is entitled to any of the Jukebox Royalty Funds.

16. Consider ABS' support for its claim, presumably pp. 14-16 of its Proposed Findings. It consists of generality upon generality regarding the superiority, longevity and esteem of its Spanish lanugage repertoire. However, ABS has not submitted a scintilla of evidence to show that any of its Spanish language titles were played on jukeboxes in 1982 or 1983. (The only submission remotely supporting their contention are the five titles claimed by both ACEMLA and ABS.)

17. In contradiction of ABS' claim, ACEMLA has submitted hard evidence that its repertoire was played and heavily played on jukeboxes in 1982 and 1983. Therefore, ABS cannot logically claim 100% of either year's funds.

18. ABS' purported documentation is illusory. As previously stated, what relevance does the Billboard "Hot 100", "Country", "Black" and "Adult Contemporary" singles charts have with respect to Spanish language music? What is the relevance of the Replay "Pop", "Country" and "R&B" charts?^{2/} Where is the nexus between ABS' most performed Spanish language titles for 1982 and 1983 and their performance, let alone appearance, on a jukebox in 1982 and 1983? In sum, ABS' whole case rests on

^{2/} Rather than condescend to submit the actual charts, ABS instead submits its self-prepared analysis whose validity, like most of ABS' evidence, must be taken on faith alone.

unsupported conclusions. It asks the Tribunal to blindly adopt its representations that because it licenses the majority of the world's music, it must also license all the music on all the jukeboxes.

19. ABS requests the Tribunal to place its faith in the empty conclusion that the funds distributed to ABS from the Jukebox Royalty Fund will somehow be redistributed to the copyright holders of the music actually played on jukeboxes. Yet any such redistribution will be administered on the basis of ABS' general surveys which utterly fail to take jukebox performances into account. Finally, distribution of the 1982 and 1983 Jukebox Royalty Funds to ABS would result in inequitable windfalls to those copyright holders who would receive distributions from ABS based on the general survey, despite the fact that their works were not performed on jukeboxes in 1982 and 1983.

ACEMLA'S ENTITLEMENT

20. Based on the record evidence in this proceeding, ACEMLA has shown that it is entitled to the remaining 5% of the 1982 Jukebox Royalty Fund and at least 5% of the 1983 Fund. Contrary to ABS' nit-picking and lengthy examination of red herrings, ACEMLA is the only party to this proceeding that has provided concrete evidence that Spanish titles in its catalogue were frequently played on jukeboxes in 1982 and 1983.

21. ABS raised a plethora of technicalities and irrelevant errors to undercut ACEMLA's case. For example, ABS has not shown that the other unsubmitted side of ACEMLA Exhibit 1, Certi-

ificate of Assumed Name contains any relevant information or any information at all. As noted in ACEMLA's Findings of Fact, the Tribunal was informed on June 20, 1985 that Latin American Music and the Latin American Music Company, Inc. had at that point assigned their rights to ACEMLA. Therefore, ACEMLA could not so notify the Court and Tribunal before the Court released its Opinion because it had not yet occurred. Mr. Bernard clearly identified that portion of an ACEMLA contract as ACEMLA's informational form (Tr. 260). ACEMLA still believes it licenses most of the current music from Spanish-speaking countries and has submitted contracts to support its claim while ABS has not submitted anything to refute that claim. (The ABS survey information cited is wholly unsubstantiated.)

22. ACEMLA submitted the correspondence with PBS to show ACEMLA's attempts to license entities and that broadcast stations do use titles in ACEMLA's catalogue such as in the program "Maso Rivera: El Maestro de Cuatro." This is the point of pages 17-20 and the first paragraph of PBS' letter of August 5, 1984, p. 21. ACEMLA Exhibit 3. The entire matter of "Frenes'," was raised by PBS and is a matter extraneous to the exhibit. That is why the subsequent PBS letter was not introduced; it is not relevant. In light of the fact that ACEMLA does not and never did claim "Frenes'," a title nearly 50 years old, ABS attempted to mislead the Tribunal when it introduced the subsequent PBS letter. This was not the only instance of their dubious tac-

tics. The record is replete with unobjective and irrelevant forays primarily intended to cloud the real issues.

23. Mr. Bernard explained the duplicated 45 rpm records submitted in ACEMLA Exhibit 4 at Tr. 320. ACEMLA never represented nor did Mr. Bernard ever state that all of the 45 rpm records in ACEMLA Exhibit 4 appeared as hits on record charts. Further, while ABS may criticize the affidavits from jukebox owners/operators submitted in ACEMLA Exhibit 12, ACEMLA emphasizes that they are the only statements submitted from jukebox operators/owners in this proceeding and that the affidavits are notarized and remain unrefuted. Such documentation was suggested by the Tribunal in the Order. ACEMLA attempted to comply. ABS did not.

24. Finally, we arrive at ABS's self-serving and insulting computation of ACEMLA's entitlement as determined by ACEMLA's showing in ABS' general survey, which specifically does not take into account jukebox performances and is, therefore, irrelevant. ABS attempted to compute ACEMLA's entitlement in two ways. The first uses ACEMLA's list of most performed works for 1982 and 1983 as its basis and concludes that ACEMLA is entitled to, at most, \$363 for 1982 and approximately \$315 for 1983 from the Jukebox Royalty Fund for performances on jukeboxes of ACEMLA's titles, despite the facts that (1) the ABS "general survey" compares the frequency of all performances in all media except jukeboxes and (2) that the Jukebox Royalty Fund is a separate,

discrete amount of money which is to be distributed on the basis of jukebox performance alone.

25. ABS' second method of determining ACEMLA's entitlement was to have ABS personnel select establishments in Hispanic neighborhoods in four cities and copy the titles in the jukeboxes in those establishment (Testimony of Gloria Messinger, Tr. 29-30). The titles of the songs present in each jukebox surveyed in August 1985 were exchanged by ABS on October 17, 1985. First, even allowing for the subjective nature of this limited survey; i.e. ABS personnel selecting the neighborhoods and the establishments and ABS personnel collecting and analyzing the data, while some of these establishments may or may not be in Spanish neighborhoods, it is doubtful whether a Hispanic ever put a quarter in the jukebox located there. Many of the jukeboxes located in New York City, for example, contain only songs by Black performers. The contents of the jukebox in the Pizza Hut in Hialeah, Florida contained not one Hispanic title. What does this prove or even infer about ACEMLA's share of Spanish music? At any rate, ACEMLA strongly questions the validity of this limited survey and has many more reservations about it than even Gloria Messinger did.

26. ABS then analyzed the song titles collected and apparently compared them to the 179 titles listed in ACEMLA's most performed titles for 1982 and 1983 (ACEMLA Exhibit 13, Statement of Gloria Messinger, Tr. 38). On this basis ABS found that only

45 were works that ACMLA could claim and therefore determined that ACMLA could only claim \$564 for 1982 and \$555 for 1983 (Tr. 40-41).

27. However, ABS is wrong. Examination of the actual titles found in the jukeboxes reveals that many titles licensed to ACEMLA, but not listed in ACEMLA Exhibit 13, did in fact appear. For example, on page 2 of the title listing for Los Burritos Restaurant in Los Angeles, "Tu Mujer" is indicated as No. 104. The same title appears on page 159 of the Edimusica catalogue licensed TO ACEMLA. Also on page 2 of Los Burritos is the title "Vuelve". This title is listed on page 165 of the Edimusica catalogue. Page 3 of Los Burritos yields "El Tamarindo" which is on page 55 of the Edimusica catalogue. On page 4 of Queen Taco in Los Angeles the title "Cumbria De La Media Noche" appears. The same title appears on page 29 of Edimusica. On the first page relating to the establishment El Conchito in Los Angeles, three separate titles, "Cuerpo Cobarde", "La Cadenita" and "El Tartamindo", appear. These same three titles appear on pages 28, 72 and 56, respectively of the Edimusica catalogue. There are many more titles listed in this "raw data" submission which are (1) in ACEMLA's catalogue and (2) were not counted as ACEMLA's by ABS.^{3/} (The above only constitutes a

^{3/} The above few examples were instantly noted by Mr. Bernard in a cursory perusal of ABS' "raw data". Many other titles listed could be cited as uncounted by ABS and in ACEMLA's catalogue. ACEMLA only listed a few due to lack of time and the fact that some titles are in catalogues not submitted to the Tribunal.

review of the first 10 pages alone!) ABS, with its accustomed lack of humility, unilaterally decided that what was not claimed as ACEMLA in its Exhibit 13 was, of course, ABS' (Tr. 38).

28. Consequently, most of ABS' conclusions concerning its "limited jukebox survey" are incorrect.^{4/} While the survey, of necessity, only involved titles on jukeboxes in 1985, it is clear that many more of ACEMLA's titles are in jukeboxes than ABS found. Alternatively, many less of ABS' titles are in jukeboxes than ABS believes. ACEMLA submits that this was just as true in 1982 and 1983 as it is in 1985.

29. After winnowing out ABS' irrelevant and minor criticisms, one is left with the following facts:

(a) A number of titles in ACEMLA's catalogue appeared on 45 rpm records (ACEMLA Exhibit 4).

(b) Many of these titles appeared in Spanish hit music charts in 1982 and 1983 (ACEMLA Exhibits 5 and 6).

^{4/} It also shows the necessity of an accurate, systematic jukebox survey. While ABS has repeatedly argued that it would be prohibitively expensive to perform such a survey ("in excess of \$200,000 and we are talking about less than that in this whole proceeding" Tr. 30), ACEMLA suspects the real reason is otherwise. The Fund totaled approximately \$3.7 million for 1982, \$3.4 million for 1983, \$5.8 million for 1984 and \$4.8 million for 1985. ACEMLA submits that since ABS in the past has received 100% of the fund and expects to do so in the future, ABS is hardly motivated to spend \$200,000 for a survey. In light of Gloria Messinger's statement that it would not be worth it for "this proceeding," it is clear that ABS believes a survey is only necessary to validate ACEMLA's claim. However, one point of any survey would be to determine what titles are played on jukeboxes and would, therefore, benefit the actual copyright holders. It appears that as long as ABS receives the fund, it has no real interest in a valid redistribution of it.

(c) Many of ACEMLA's titles appeared on jukeboxes in establishments in Hispanic neighborhoods in 1982 and 1983 and were popular in those jukeboxes (ACEMLA Exhibit 12). Therefore, one can only conclude that titles in ACEMLA's catalogue were popular Spanish titles in 1982 and 1983 and were heavily played on jukeboxes.

30. Since Hispanics constituted 6.4% of the U.S. population in 1983 (ACEMLA Exhibit 8, p. 1), buy more records than non-Hispanics (ACEMLA's Supplemental Statement, Exhibit E), and are fiercely allegiant to Spanish music (Id. at Exhibit F), one may reasonably assume that at least 6.5% of all jukebox use is by Hispanics and that the large majority of that use is performance of Hispanic titles. Since the Hispanic population is younger than the non-Hispanics (Id. at Exhibit F), one may also assume that Hispanics using jukeboxes are playing current Hispanic titles and not "Frenesi". It has already been established that titles in ACEMLA catalogues were Hispanic hit records in 1982 and 1983.

31. On the basis of the foregoing, ACEMLA submits that it is entitled to the remaining 5% of the 1982 Jukebox Royalty Fund and at least 5% of the 1983 Fund.^{5/} Distribution of the funds

^{5/} In light of ABS' limited and patently deficient August 1985 jukebox survey, there appears to be more of ACEMLA's titles on jukeboxes in Hispanic establishments than even ACEMLA imagined. However, in light of the Tribunal's Order, 49 Fed. Reg. 46458, published November 26, 1984, ACEMLA is limited to a claim of 5% for 1982 and 1983. The Tribunal may wish to review its calculations for Spanish language programming either in the context of this consolidated proceeding or for future proceedings.

in this manner will, at worst, assure the Tribunal that some of the funds collected from jukebox owners for the Jukebox Royalty Fund for the benefit of licensees whose works are performed on jukeboxes, and not on radio, television, muzak or concert halls, will actually be distributed to the intended beneficiaries.

CONCLUSION

32. ACEMLA is a "performing rights society" as defined by 17 U.S.C. Section 116(e)(3) because it is an association that licenses the public performance of non-dramatic musical works on behalf of copyright members.

33. ABS has not shown that it is entitled to any portion of the remaining 5% of the 1982 Jukebox Royalty Fund, nor has it shown that it is entitled to any of the 1983 Jukebox Royalty Fund.

34. ACEMLA, on the contrary, has shown that its members are entitled to the remaining 5% of the 1982 Jukebox Royalty Fund and that it is entitled to at least 5% of the 1983 Jukebox Royalty Fund.

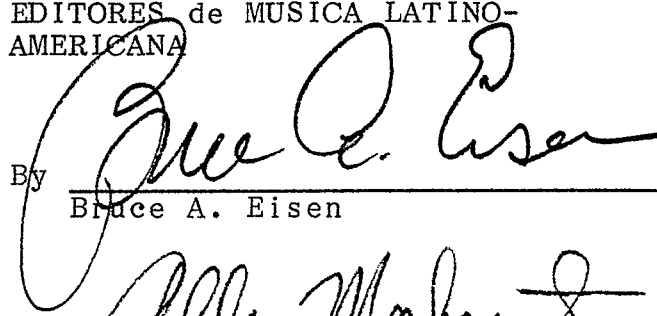
Respectfully submitted,

ASOCIACION de COMPOSITORES y
EDITORES de MUSICA LATINO-
AMERICANA


Shrinsky, Weitzman &
Eisen, P.C.
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 872-0010

October 24, 1985

By


Bruce A. Eisen

By


Allan G. Moskowitz

Its Attorneys

CERTIFICATE OF SERVICE

I, Joanne K. Lee, a secretary in the law firm of Shrinsky, Weitzman & Eisen, P.C., do hereby certify that on this 24th day of October, 1985, I sent a copy of "ACEMLA's Reply to the Proposed Findings of Fact and Conclusions of Law of ASCAP, BMI and SESAC", via United States first class mail, postage prepaid, to each of the following:

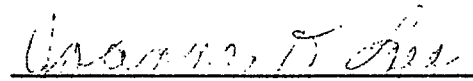
Mr. Bernard Korman, Esquire
General Counsel
ASCAP
One Lincoln Plaza
New York, New York 10023

Charles T. Duncan, Esquire
Reid and Priest
Suite 1100
1111 19th Street, N.W.
Washington, D.C. 20036

Mr. Nicholas Arcomano
Vice President
SESAC, Inc.
10 Columbus Circle
New York, New York 10019

Dennis Angle, Esquire
350 Fifth Avenue
New York, New York 10118

Mr. Edward W. Ray*
Acting Chairman
Copyright Royalty Tribunal
1111 20th Street, N.W.
Suite 450
Washington, D.C. 20036


Joanne K. Lee

* Hand delivered